06-1464-cv

In the United States Court of Appeals for the Second Circuit

WESTCHESTER DAY SCHOOL,

Plaintiff-Appellee,

- against -

VILLAGE OF MAMARONECK, THE BOARD OF APPEALS OF THE VILLAGE OF MAMARONECK, MAURO GABRIELE, GEORGE MGRDITCHIAN, PETER JACKSON, BARRY WEPRIN AND CLARK NEURINGER, in Their Official Capacity as Members of the Board of Appeals of the Village of Mamaroneck, and ANTONIO VOZZA, in His Official Capacity as a Former Member of the Board of Appeals of the Village of Mamaroneck,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

Brief *Amicus Curiae* of the Becket Fund for Religious Liberty, the Association of Christian Schools International, and the Council for Christian Colleges and Universities in Support of Plaintiff-Appellee and in Support of Affirmance

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, *amici* state that none of the *amici* has a parent corporation, nor does any *amicus* issue any stock.

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INTEREST OF THE *AMICI*

Pursuant to Fed. R. App. P. 29, the Becket Fund for Religious Liberty, the Council for Christian Colleges and Universities, and the Association of Christian Schools International respectfully submit this brief *amicus curiae* in support of Appellee Westchester Day School (the "School") and affirmance. Counsel for all parties have consented to the filing of this brief. Fed. R. App. P. 29(a). *Amici* share a common interest in assuring that the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc, *et seq.* ("RLUIPA"), is both upheld as constitutional and interpreted to address effectively the discretionary burdens that local governments so commonly impose on core religious activities—including religious education—through land-use laws. *Amici* believe that their collective experience as institutions that use land for religious educational purposes will offer the Court a perspective that is helpful in its resolution of this appeal. Appendix A contains additional information about each *amicus.*

SUMMARY OF ARGUMENT

The trial court correctly concluded that Defendants ("the Village") had imposed a substantial burden upon Westchester Day School's ("WDS") religious exercise within the meaning of RLUIPA. Supreme Court and lower court precedent make clear that a government action imposes a substantial burden on

religious exercise when it has a tendency to inhibit that exercise. Supreme Court and lower court precedent also make clear that religious accommodations, such as those mandated by the Free Exercise Clause and incorporated in RLUIPA, do not violate the Establishment Clause. Neither RLUIPA nor the Establishment Clause require that religious buildings be wholly devoted to religious exercise in order to qualify for protection.

ARGUMENT

I. THE DISTRICT COURT PROPERLY FOUND THAT THE VILLAGE PLACED A SUBSTANTIAL BURDEN UPON WDS' RELIGIOUS EXERCISE.

C. RLUIPA Is a Civil Rights Statute Intended to Protect Religious Organizations Like WDS.

RLUIPA is a federal civil rights statute—passed with broad, bi-partisan support—to remedy a pattern of unconstitutional restrictions on religious exercise through highly discretionary or patently discriminatory land-use laws. By a series of nine separate hearings over a three-year period, Congress determined that religious organizations "are frequently discriminated against on the face of zoning codes and also in the highly individualized and discretionary processes of land use regulation." Joint Statement of Sens. Hatch & Kennedy, 146 CONG. REC. S7774 (daily ed. July 27, 2000) ("Sponsors' Statement"). Congress also found that religious organizations "cannot function without ***a physical space adequate to their needs*** and consistent with their theological requirements. The right to build,

buy, or rent such a space is an indispensable adjunct of the core First Amendment right to assemble for religious purposes." *Id.* (emphasis added).

In response to these findings, Congress carefully crafted RLUIPA § 2, the land-use part of the Act. The various distinct provisions of § 2 are designed to reinforce existing constitutional protections for religious speech, assembly, and worship. One of those protections is embodied in § 2(a), which provides as follows:

> (1) GENERAL RULE- No government shall impose or implement a land use regulation in a manner that imposes a ***substantial burden*** on the religious exercise of a person, including a religious assembly or institution, ***unless the government demonstrates*** that imposition of the burden on that person, assembly, or institution—
>
> (A) is in furtherance of a ***compelling governmental interest***; and
>
> (B) is the ***least restrictive means*** of furthering that compelling governmental interest.

42 U.S.C. § 2000cc(a)(1). This provision applies where the plaintiff can establish that one of three possible "jurisdictional hooks" exists—the burden (a) was imposed in a program that received federal funds, (b) affected interstate commerce, or (c) was imposed pursuant to a system of individualized assessments. *Id.* RLUIPA also underscores that the "religious exercise" not to be burdened includes "***any*** exercise of religion, whether or not compelled by, or central to, a system of religious belief," and includes "[t]he use, building, or conversion of real property for the purpose of religious exercise." RLUIPA § 8(7).

As the Seventh Circuit recently explained, § 2(a) exists to "backstop[] the

explicit prohibition of religious discrimination in the later section of the Act, much as the disparate-impact theory of employment discrimination backstops the prohibition of intentional discrimination." *Sts. Constantine and Helen Greek Orthodox Church* v. *New Berlin*, 396 F.3d 895, 900 (7th Cir. 2005). The provision protects religious organizations from inherent dangers of systems where "a state delegates essentially standardless discretion to nonprofessionals operating without procedural safeguards." *Id.* In such systems, Congress found that unlawful intent is difficult to prove and may "lurk[] behind such vague and universally applicable reasons as traffic, aesthetics, or 'not consistent with the city's land use plan.'" Senate Sponsors' Statement S7774. The danger is especially acute for racial and religious minorities; Congress noted a special danger for "Jewish shuls and synagogues." *Id.* Because this case represents exactly what Congress targeted with RLUIPA § 2(a)—a discretionary zoning process denying an adequate place to assemble for religious exercise—the district court properly awarded relief to WDS.

D. The District Court Properly Applied RLUIPA's Substantial Burden Standard.

1. RLUIPA should be interpreted according to existing Supreme Court precedent.

RLUIPA does not define the term "substantial burden." However, RLUIPA's legislative history indicates that Congress intended the term to be given

the same meaning that it was given in the Supreme Court's Free Exercise cases. As the bill's co-sponsors stated:

> The Act does not include a definition of the term 'substantial burden' because it is not the intent of this Act to create a new standard for the definition of 'substantial burden' on religious exercise. Instead that term as used in the Act should be interpreted by reference to Supreme Court jurisprudence.

Sponsors' Statement S7776.

Moreover, even without the instruction of legislative history, it is a familiar canon of statutory construction that "[i]n the absence of contrary indication, we assume that when a statute uses…a term [of art], Congress intended it to have its established meaning." *See, e.g., McDermott* v. *Wilander*, 498 U.S. 337, 342 (1991). Here, the term "substantial burden" has a well-established meaning in the Supreme Court's Free Exercise jurisprudence dating to the Court's seminal decision in *Sherbert* v. *Verner*.

2. Existing Free Exercise precedent demonstrates that a "substantial burden" on religious exercise is one which has a "tendency to inhibit" or a chilling effect upon such exercise.

In *Sherbert* v. *Verner*, 374 U.S. 398, 399-400 (1963), the Court held that the government's denial of unemployment benefits to a Sabbatarian who refused to take a job on Saturday imposed a substantial burden on religious exercise in violation of the Free Exercise Clause. Although the regulation didn't specifically prohibit religious practice, the Court rejected the argument that there was no

burden merely because all that was at issue was denial of a governmental "benefit or privilege." *Id.* at 404.

Instead, the Court held that the relevant inquiry for substantial burden was whether the government action had a "***tendency to inhibit*** constitutionally protected activity." *Id.* at 404 & n.6 (emphasis added). In Sherbert's case, the Court held that there was such a "tendency to inhibit" because withholding employment benefits put "pressure upon her to forego [a religious] practice." *Id*. at 404.

Subsequent Supreme Court cases re-affirmed and amplified *Sherbert*'s "tendency to inhibit" standard. For example, in *Thomas* v. *Review Bd.*, 450 U.S. 707, 717 (1981), the Court again emphasized that although government action that "compel[led] a violation of conscience" would be a substantial burden, this wasn't the only way to meet the standard. Instead, the Court held it is sufficient to demonstrate a "coercive impact." *Id.* Accordingly, the Court held that "condition[ing] receipt of an important benefit" on the restraint of religious practice was a "substantial burden," because although government "compulsion may be indirect, the infringement upon free exercise is nonetheless substantial." *Id*. at 717-18. *See also Hobbie* v. *Unemployment Appeals Comm'n*, 480 U.S. 136, 141 (1987)(substantial burden exists where government "put[s] substantial pressure on an adherent to modify his behavior.")(citations omitted); *Lyng* v.

Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 450 (1988)(substantial burden exists where government's policy has "a ***tendency*** to coerce individuals into acting contrary to their religious beliefs.")(emphasis added).

In sum, these cases make clear that the appropriate standard for determining whether a burden is substantial is to examine whether it has a tendency to inhibit or constrain religious conduct or expression. Or as the Eleventh Circuit put it in reviewing the cases that are the genesis for RLUIPA's substantial burden standard:

> The combined import of these articulations [by the Supreme Court in the *Sherbert* line of cases] leads us to the conclusion that a 'substantial burden' must place more than an inconvenience on religious exercise; a 'substantial burden' is akin to significant pressure which directly coerces the religious adherent to conform his or her behavior accordingly. Thus, a substantial burden can result from pressure that tends to force adherents to forego religious precepts or from pressure that mandates religious conduct.

Midrash Sephardi v. *Town of Surfside,* 366 F.3d 1214, 1227 (11th Cir. 2004).

Although the tendency to inhibit test does not mean that every inconvenience placed on religious exercise is substantial (*see infra* p. 22), demonstrating the existence of a substantial burden "is not a particularly onerous task." *McEachin* v. *McGuiness*, 357 F.3d 197, 202 (2d Cir. 2004). The plaintiff need only show that religious exercise was burdened in some non-trivial manner. *Id.* at 202 (discussing factors for finding "a substantial, as opposed to inconsequential burden" on religious exercise); *see also Jolly* v. *Coughlin,* 76 F.3d 468, 477 (2d Cir.1996) (describing substantial burden as one which "puts

substantial pressure on an adherent to modify his behavior and to violate his beliefs") (quoting *Thomas*, 450 U.S. at 718). Thus, the fact that a "burden would not be insuperable" does "not make it insubstantial." *Constantine*, 396 F.3d at 901.[1] The trial court properly followed this precedent, finding a substantial burden here because the Village's actions had placed a "chilling effect" upon WDS' religious exercise. *Westchester Day School* v. *Village of Mamaroneck*, 417 F.Supp.2d 477, 547 (S.D.N.Y. March 2, 2006).

3. The trial court's finding of substantial burden falls squarely within the weight of authority interpreting RLUIPA's land use provisions.

The trial court's holding falls well within the range of cases where courts have found a substantial burden in the denial of a particular zoning permit that inhibits religious exercise on a religious institution's own property.

The Seventh Circuit's substantial burden analysis in *Constantine* is consistent with this Court's approach in *McEachin* and *Jolly* and the trial court's decision here. In the most extensive treatment to date of RLUIPA's substantial burden provision, the court concluded that denying a church that had outgrown its existing facility a variance to construct a new church building violated RLUIPA.

[1] As discussed *infra* at p.49, courts have applied a more stringent interpretation of "substantial burden" in resolving *facial* challenges to zoning ordinances (as opposed to *as-applied* challenges to the denial of a particular permit).

Judge Posner's decision made clear that burdens need not be "insuperable" in order to be substantial under RLUIPA:

> The Church in our case doesn't argue that having to apply for what amounts to a zoning variance to be allowed to build in a residential area is a substantial burden. It complains instead about having either to sell the land that it bought in New Berlin and find a suitable alternative parcel or ***be subjected to unreasonable delay by having to restart the permit process***….
>
> The burden here was substantial. ***The Church could have searched around for other parcels of land*** (though a lot more effort would have been involved in such a search than, as the City would have it, calling up some real estate agents), ***or it could have continued filing applications with the City***, but in either case there would have been ***delay, uncertainty, and expense***.
>
> ***That the burden would not be insuperable would not make it insubstantial.*** The plaintiff in the *Sherbert* case, whose religion forbade her to work on Saturdays, could have found a job that didn't require her to work then had she kept looking rather than giving up after her third application for Saturday-less work was turned down. But the Supreme Court held that the fact that a longer search would probably have turned up something didn't make the denial of unemployment benefits to her an insubstantial burden on the exercise of her religion.

Constantine, 396 F.3d at 900-901 (emphasis added).

Following *Constantine*, the trial court found a substantial burden. Here, as in *Constantine*, the school was denied the ability to develop its property for religious education and practice and needs additional space because it is unable to adequately practice its religious beliefs in its current facility. And like the *Constantine* church, it suffered uncertainty, delay, and expense with predictable and devastating results: not only was the quantity and quality of religious

education affected, but it was forced to curtail religious and educational activities and suffered a drop in enrollment.[2]

The Seventh Circuit's holding that a burden need not be insuperable in order to be substantial was recently reiterated by the Ninth Circuit. In *Guru Nanak Sikh Soc'y* v. *County of Sutter*, --- F.3d. ---, 2006 WL 2129737 (9th Cir. Aug. 1, 2006), the Ninth Circuit found a substantial burden where the county's actions in denying a CUP had "to a significantly great extent lessened the possibility that future CUP applications would be successful." 2006 WL 2129737, at *7. Such uncertainty over whether the temple could ever obtain a CUP had a tendency to inhibit religious exercise. *Id.* at *7-9 (citing *WDS*). In reaching this conclusion, the Ninth Circuit relied upon the trial court's decision here.

The same was true in *Living Water Church of God* v. *Charter Township of Meridian*, 384 F.Supp.2d 1123 (W.D. Mich. 2005), which is indistinguishable from *WDS*. *See also Guru*, 2006 WL 2129737, at *9 (relying on *Living Water*). There, the trial court held that denying a CUP to build a permanent home for a church's Christian school substantially burdened religious exercise. That school, like WDS, was unable to adequately "practice its religious beliefs in its current location because the facilities are too small for the needs of the congregation and staff."

[2] The depth of the findings of burden on religious exercise as a result of the permit denial is much more extensive in this case, in which the court held a 7-day trial and made voluminous factual findings, than in *Constantine*, where the court was reviewing a summary judgment record.

Living Water, 384 F.Supp.2d at 1333. Notably, space constraints did not ***completely*** prevent the plaintiff from carrying out ***any*** religious activity at the site, but rather forced the school to curtail and to choose among its religious activities. *Id.* The same is true for WDS. *WDS*, 417 F.Sup.2d at 490-94 (detailing numerous religious educational activities which have been curtailed and/or eliminated due to the permit denial). The court also found it significant that the school was "severely limited in its ability to recruit" because of "the uncertainty about the future space and the current lack of programming." *Living Water*, 384 F.Supp.2d at 1133. Again, the same is true here. *WDS*, 417 F.Supp.2d 494-95 (detailing recruiting difficulties and falling enrollment at WDS, despite growing demand for Orthodox Jewish schools).

The township in *Living Water* also reversed course on the school's permit application, first approving the CUP, then forcing the school to reapply, and finally denying the renewed application. *Living Water*, 384 F.Supp.2d at 1126-28. The trial court found that this process created "delay, expense, and uncertainty" for the school, which would be forced to reapply or search for another site. *Id.* at 1134, citing *Constantine*, 396 F.3d at 901. Under these circumstances, the *Living Water* court held that the "burden imposed by the denial of the SUP is not merely an inconvenience…[It] imposes a substantial burden on religious exercise under RLUIPA." *Id.* WDS is no different: the Village reversed course on WDS'

application, rescinding its original declaration and ordering WDS to complete a lengthy environmental review process (a decision the trial court set aside) before finally denying WDS' application for reasons that "are not substantiated by evidence in the public record…and are, to a substantial extent, based on serious factual errors." *WDS,* 417 F.Supp.2d 507-18, 539. The Village has made it clear that, if WDS were to re-apply, it would be forced to endure the application and environmental review process all over again. *Id.* at 516-17. The permit denial has imposed great expense, crippling uncertainty, and inordinate delay upon WDS.

The decision in *Cottonwood Christian Center* v. *Cypress,* 218 F.Supp.2d 1203 (C.D.Cal. 2002), is also instructive. There, the court found a substantial burden where the city refused to grant a CUP for a new church that was needed because the church had outgrown its existing facility. Like WDS, the inadequate size of the *Cottonwood* church impeded and prevented it from carrying out various religious activities. *Id.* at 1212. Just as space constraints prevented Cottonwood Christian from conducting outreach to potential new members, *id.* at 1212, WDS faces space constraints for current and incoming students and faces falling enrollment. *WDS,* 417 F.Supp.2d 494-95. Cottonwood Christian also faced difficulty in conducting its daycare ministry, its women's ministries, and various adult classes. *Cottonwood*, 218 F.Supp.2d at 1212. WDS has faced similar difficulties, since lack of space inhibits its ability to provide religious educational

classes, counseling, and fine arts instruction for its students. *WDS*, 417 F.Supp.2d 490-94. Thus, the burden here is at least as "substantial" as that in *Cottonwood*.

Numerous other courts have likewise found a substantial burden where the government denied a zoning permit that prevented religious exercise at a particular piece of property:

- *DiLaura* v. *Ann Arbor Charter Township*, 30 Fed.Appx. 501 (6th Cir. 2002): Finding a substantial burden under RLUIPA where the town denied a variance to allow the plaintiffs to use a particular property in the township as a religious retreat center. The Court held that preventing "gatherings of individuals for the purposes of prayer (the activity [sought by the religious landowner]) is a use of land constituting a religious exercise that is substantially burdened." *Id.* at 509. Notably, the Court held that the burden existed even though the plaintiff had the option of applying for a CUP after the variance was denied.

- *Church of the Hills* v. *Township of Bedminster*, 2006 WL 462674 (D.N.J. Feb. 24, 2006): Allowing RLUIPA substantial burden claim to go forward where variance denial prevented church from meeting together as a body, participating in necessary ministries, and being accessible to its congregation.

- *Castle Hills First Baptist Church* v. *Castle Hills*, 2004 WL 546792 (W.D.Tex. 2004): Denying city's motion for summary judgment on substantial burden claim, where city refused to accept and grant zoning permit application to use existing church property for its religious school.

- *Hale O Kaula* v. *Maui Planning Comm'n*, 229 F.Supp.2d 1056 (D.Haw. 2002): Allowing RLUIPA substantial burden claim to go forward where county denied church SUP to expand building to allow needed religious activities.

- *Elsinore Christian Center* v. *Lake Elsinore*, 291 F.Supp.2d 1083

(C.D.Cal. 2003): Finding substantial burden where city denied a CUP to allow church to move from existing inadequate facility to a new property.

- *Greater Bible Way Temple* v. *Jackson*, 2005 WL 3036527 (Mich.App. 2005): Finding substantial burden where the city prohibited the church from adding a ministry building for the elderly and disabled near existing church property.

- *Shepherd Montessori* v. *Ann Arbor*, 675 N.W.2d 271 (Mich.App. 2003): Allowing substantial burden claim to go forward where township denied variance to allow plaintiff to operate religious school adjacent to religious daycare.

- *Jesus Center* v. *Farmington Hills*, 544 N.W.2d 698, 703–704 (Mich.App. 1996): Finding substantial burden in denial of application to run a homeless shelter on church property where that action "flow[ed] from [] religious beliefs and [was] an exercise of those beliefs."

- *Alpine Christian Fellowship* v. *County Comm'rs*, 870 F. Supp. 991, 994 (D.Colo. 1994): Finding substantial burden under Free Exercise Clause where County denied a SUP to allow church to operate a religious school on its property. *Id.* ("[g]iven the importance of religious education to…the Church, the importance of conducting the school within the church building is self evident.")

- *First Covenant Church* v. *Seattle*, 840 P.2d 174 (Wash. 1992): Finding substantial burden under Free Exercise Clause where landmarking law imposed severe financial burdens upon the church and prohibited alteration of the church building.

In sum, the vast weight of authority demonstrates that permit denials that inhibit religious exercise on a particular property impose a substantial burden under RLUIPA §2(a). The facts demonstrate that WDS' religious exercise was inhibited in many specific ways. The trial court's ruling was correct.

4. Cases finding no substantial burden are inapposite.

i. The Village relies upon an inapposite facial challenge standard.

The Village overlooks the binding precedent of this Court, as applied in *Jolly* and *McEachin*, and relies instead upon inapposite cases challenging the mere requirement that a religious organization participate in the land use permitting process.[3] The Village relies upon *Civil Liberties for Urban Believers* v. *Chicago*, 342 F.3d 752 (7thCir. 2003) ("*CLUB*"), and an inaccurate description of *San Jose Christian College* v. *Morgan Hill*, 360 F.3d 1024 (9th Cir. 2004) ("*SJCC*"). The Village notably omits that these decisions fall into a distinct category of religious land use cases where courts generally hold there is no substantial burden: *i.e.*, cases involving a ***facial*** challenge to the zoning permitting process, where plaintiffs argue that ***merely having to apply*** for a permit is a substantial burden. *See CLUB*, 342 F.3d at 761 (rejecting argument that process of applying for a permit to locate a church in R zones was a substantial burden); *SJCC*, 360 F.3d at 1028, 1035 (rejecting argument of "substantial burden" in requirement to file "complete" zoning application).

[3] The Village dismisses *Jolly* and *McEachin* out-of-hand because both cases deal with the free exercise of prisoners. Village Br. 39. It makes no attempt to explain why the reasoned discussion of Supreme Court substantial burden precedent found in those cases is not applicable here.

In contrast, this case involves a challenge to a ***particular denial*** of a permit to engage in religious exercise. It is a firmly entrenched distinction in religious land-use cases that the general requirement to apply for a permit does ***not*** impose a substantial burden, but that the particular denial of such a permit may. Thus while facial challenges like those of *CLUB* and *SJCC* routinely fail, courts like *Constantine, Guru Nanak, DiLaura, Cottonwood,* and many others evaluating the ***denial*** of permits for religious institutions consistently hold that such denials may impose a substantial burden.

For that reason, the "effectively impracticable" standard of *CLUB* cannot be divorced from the context of the facial challenge in which it was announced. The rigorousness of the "effectively impracticable" standard is consistent with the normal hurdle faced by plaintiffs bringing a facial challenge of showing that "no set of circumstances exists" in which the law can be applied constitutionally. *United States* v. *Salerno*, 481 U.S. 739, 745 (1987).

But courts—including the Seventh Circuit in *Constantine*—have made clear that the rigors of the facial challenge standard are not appropriate for as-applied challenges to a decision to deny a particular use permit. In those cases, the standard is whether the denial inhibits the religious institution's attempt to use its property for religious exercise in a way that is more than an inconvenience. *See, e.g., Constantine*, 396 F.3d at 900 (distinguishing *CLUB* from facts in *Constantine*

because "the Church in [this] case doesn't argue that ***having to apply*** for what amounts to a zoning variance to be allowed in a residential area is a substantial burden")(emphasis added); *United States* v. *Maui Cy.*, 298 F.Supp.2d 1010, 1017 (D.Haw. 2003) (holding that because *CLUB*'s "facial challenge" standard did not apply to "an as-applied challenge" to permit denial). The Seventh Circuit's rejection of its own *CLUB* standard in *Constantine* is especially fatal to the Village's suggestion that *CLUB* should govern this case.[4]

The Village also cites *SJCC* in support of the "effectively impracticable" standard. But the Ninth Circuit has explicitly rejected the "effectively impracticable" standard, explaining that the result in *SJCC* is consistent with *CLUB* only in that both cases reject the notion that the mere requirement to apply for a permit imposes a substantial burden. *See Guru*, 2006 WL 2129737, at *7, n.12. Thus, the Village's argument that there can be no substantial burden so long as WDS continues to exist and provide at least some Orthodox Jewish education is unsupported in law.

[4] Application of the "effectively impracticable" standard to as-applied challenges to permit denials is also inappropriate because it would render meaningless RLUIPA's "exclusions and limitations" provision, which prohibits restrictions that exclude religious assemblies from jurisdictions. *See* RLUIPA §2(b)(3). The Eleventh Circuit declined to follow *CLUB*'s "effectively impracticable" standard in a substantial burden case for that very reason. *Midrash*, 366 F.3d at 1227.

ii. The Village relies upon arguments contrary to Congressional intent and existing precedent.

The Village's argument (p. 39-40) that the mere ability to submit a revised application defeats most claims of substantial burden proves too much. If that were the rule, no RLUIPA claim would ever succeed, because it is always possible to submit a new application. This result is not what Congress intended, so it is unsurprising that courts consistently reject that argument. As discussed *supra*, *Constantine, Guru,* and *Living Water* specifically reject this argument, finding substantial burdens in re-applying because such applications necessarily impose delay, expense, and uncertainty upon the religious organization. *Guru*, 2006 WL 2129737, at *8; *Constantine*, 396 F.3d at 901; *Living Water*, 384 F.Supp.2d at 1132-33. The Village's attempt to manufacture a distinction between those cases and this one is both unpersuasive as a matter of law and contrary to the facts found by the trial court.

iii. The Village relies upon cases where permit denials had no tendency to inhibit religious exercise.

The Village relies on a second category of inapposite cases, those where permit denials had no tendency to inhibit religious exercise.[5] This is well-illustrated by the Village's citation to *Episcopal Student Foundation* v. *City of Ann Arbor*, 341 F.Supp.2d 691 (E.D.Mich. 2004), where the court found no substantial

[5] Indeed, the existence of such cases belies the Village's straw-man argument that WDS is seeking immunity from zoning regulation. Village Br. at 49.

burden in denying a permit to allow a religious institution to destroy historic architecture on its property so it could expand its facility. The court found the denial did not cause a substantial burden because the institution had a large unused space in its existing facility that it could use. *Id*. at 704. No substantial burden was present because the permit denial had no tendency to inhibit religious exercise. *See also Midrash*, 366 F.3d at 1227-28 (mere "inconvenience" of "walking a few extra blocks" to services isn't a substantial burden); *Corporation of the Presiding Bishop* v. *West Linn*, 111 P.3d 1123, 1130 (Ore. 2005) (no substantial burden in denying permit where church had ample room to operate without "eliminat[ing] or reduc[ing] church activities"). By contrast, WDS faces serious burdens; the trial court found many ways in which its religious exercise was frustrated and impeded. *WDS*, 417 F.Supp.2d at 490-94. Unlike the plaintiffs in *Epsicopal Student Foundation*, *Midrash*, and *West Linn*, WDS suffers more than mere inconvenience and has no simple solution to its problems—it must expand, and without the Village's permission to do so, its religious exercise is substantially burdened.

II. WDS' USE OF ITS FACILITIES FOR RELIGIOUS PURPOSES IS "RELIGIOUS EXERCISE" UNDER RLUIPA.

The Village's primary argument on appeal is that WDS is not protected by RLUIPA § 2(a) because its land use is not "religious exercise" within the definition of RLUIPA. The Village's arguments are based upon mistakes of both fact and

law. The Village relies upon the incorrect legal premise that accommodations for religious claimants must necessarily accompany similar accommodations for secular claimants. The Supreme Court, this Court, and numerous circuit courts have rejected this argument. The Village also relies upon the incorrect legal premise that facilities must be "entirely or wholly" used for religious purposes in order to qualify for RLUIPA's protection. Village Br. 34, n.22. This assumption is likewise unsupported in law. Finally, although it was under no obligation to do so, WDS has proven that its facilities are in fact devoted to religious exercise. There can be no doubt that WDS' building plans are entitled to protection under RLUIPA.

A. Religious Accommodations Need Not Come Packaged with Similar Benefits to Secular Entities.

RLUIPA's religious accommodations need not come packaged with similar accommodations for secular conduct in order to comply with the Establishment Clause. Since this Court's initial decision in this case, the Supreme Court has held that RLUIPA's religious accommodations do not violate the Establishment Clause.[6] *Cutter* v. *Wilkinson,* 544 U.S. 709 (2005). There, the Supreme Court ruled that RLUIPA's prisoner provisions properly lifted "government-created

[6] Although it is the leading case on the constitutionality of religious accommodations, the Village manages to cite *Cutter* only once (in a footnote) in its 100-page brief. Village Br. 74, n.35. The Village does not attempt to distinguish RLUIPA's land use provisions from its prisoner provisions, nor otherwise explain why one could be constitutional while the other is not.

burdens on private religious exercise," a legislative action perfectly compatible with the Establishment Clause. *Id.* at 720. The Supreme Court based its decision upon the venerable principle that "[r]eligious accommodations…need not 'come packaged with benefits to secular entities.'" *Id.* at 724 (quoting *Corporation of Presiding Bishop* v. *Amos*, 483 U.S. 327, 338 (1987)).

Indeed, some religious accommodations are mandated by the Free Exercise Clause, despite the fact they may be unavailable to non-religious claimants, and RLUIPA's land use provisions largely mirror those constitutional accommodations. *See* WDS Br. 54-59 (demonstrating that RLUIPA's protections in large part mirror the standard already applicable under the Free Exercise Clause); DOJ Br. 37-49 (same). The Supreme Court has a long history of permitting such accommodations. In *Sherbert*, the Court found a substantial burden on religious exercise where the plaintiff was penalized for abstaining from work on Saturdays for religious reasons. 374 U.S. at 404-05. No similar benefits were available to persons with non-religious reasons for abstaining from work on Saturdays, but the Court expressly rejected the notion that this accommodation violated the Establishment Clause. *Id.* at 409-10. Similarly, in *Thomas,* the Court found a substantial burden where the government penalized the plaintiff for refusing war-related work due to his religiously motivated pacifism. 450 U.S. at 716-18. No such benefits were available to those who abstained from war-related

work due to secular motivations. *Id.* at 714. The Supreme Court summarily rejected the notion that this accommodation violated the Establishment Clause.

This Court has also upheld broad legislative accommodations of religious exercise, even when they do not come packaged with similar secular accommodations. In *Hankins* v. *Lyght*, 441 F.3d 96 (2d Cir. 2006), this Court upheld that the Religious Freedom Restoration Act (RLUIPA's predecessor) as applied to actions of the federal government. In doing so, this Court rejected an Establishment Clause challenge to RFRA, holding that "exempting religious organizations from compliance with neutral laws does not violate the Constitution…appellant faces an unwinnable battle in claiming that the RFRA—a limited exemption for religious organizations from compliance with neutral laws—violates the Establishment Clause." *Id.* at 108. This reasoning applies with even greater force to RLUIPA, which is even more narrowly limited than its predecessor.[7] The Village thus faces an "unwinnable battle" in attempting to prove that RLUIPA's tailored exemptions for religious exercise violate the Establishment Clause.

[7] RFRA imposed the strict scrutiny test on all laws which burdened religious exercise. Even in its pared-down form, it still applies to all such actions by the federal government. *Id.* at 105-09. RLUIPA, by contrast, is narrowly tailored to two distinct areas of law in which Congress found evidence of frequent abuse: land use and prisoners.

Other circuits have also upheld religious accommodations in the land-use context. In *Boyajian* v. *Gatzunis*, 212 F.3d 1 (1st Cir. 2000), the First Circuit rejected an Establishment Clause challenge to the Dover Amendment, a state law exempting religious organizations from many zoning regulations. That law, like RLUIPA, was enacted in response to discrimination against religious land use—in that case, a town which prohibited the operation of religious schools, but not secular schools, in residential zones. *Boyajian*, 212 F.3d at 5. That law, like RLUIPA, did not provide land use immunity: religious organizations still had to comply with ordinary restrictions on building height, setback, and lot area. *Id.* at 6. The First Circuit found that the exemptions provided to religious organizations were perfectly constitutional, even though some secular organizations did not enjoy the same benefits. Rather, this "effort to eliminate local zoning discrimination is fully in line with the Court's approval of government actions aimed at lifting burdens from the exercise of religion." *Id.* at 8. RLUIPA is no different.

B. Religious Facilities Need Not Be "Wholly or Entirely" Devoted to Religious Exercise in Order to Qualify for Protection.

1. Protection of facilities used only partially for religious purposes does not violate the Establishment Clause.

Religious facilities need not be "wholly or entirely" devoted to religious use in order to qualify for protection. The Village's argument to the contrary has been

rejected numerous times. The Fourth Circuit rejected an Establishment Clause challenge to a zoning law which went even further than RLUIPA—it exempted religious schools from the special exception permitting process entirely. In *Ehlers-Renzi* v. *Connelly School of the Holy Child*, 224 F.3d 283 (4th Cir. 2000), a local law exempted religious schools from the general requirement to apply for a special exception permit. Neighbors challenged the ordinance after a religious school began expansion without obtaining a special exception permit. *Id.* at 285. The court upheld the exemption for religious landowners, holding that it operated to alleviate government-created burdens on religious exercise and to avoid government probing of and interference with religious activities. *Id.* at 285-86.

The neighbors there made the same argument as the Village here: that the law was so broadly worded that it might provide benefits to wholly secular schools operated on land owned by religious organizations. *Id.* at 289-90. The court rejected this reasoning.[8] First, such reasoning was purely hypothetical and unrelated to the case at bar, which involved a religious school operated by a religious organization. *Id.* at 290. Second, the lack of detailed inquiry into the

[8] The court relied upon *Forest Hills Early Learning Center, Inc.* v. *Grace Baptist Church,* 846 F.2d 260 (4th Cir. 1988), which upheld an exemption from daycare licensing laws for religious organizations. The court there upheld the law despite the fact that it mandated no inquiry into the religious nature of the childcare activities. *Id.* at 263-64. The court found this was a proper mechanism for protecting religious exercise while avoiding the excessive entanglement that would follow from detailed judicial inquiry into religious practices. *Id.*

religious use of the property properly avoided unnecessary government intrusion and inquiry into the details of religious practice. *Id.*

This reasoning applies with equal force here. For starters, the Village's extreme hypotheticals (Village Br. 35) bear no resemblance to the facts here, where WDS demonstrated at trial that religious activity takes place throughout the school and is incorporated into nearly every aspect of its religious educational activities. *WDS,* 417 F.Supp.2d at 495-98. The doomsday scenarios the Village dreams up are not only purely hypothetical, they prove too much. If facilities must be 100% devoted to religious exercise, a church could lose its RLUIPA protection for permitting an Alcoholics Anonymous meeting in its basement; a synagogue could lose its much-needed accommodation by permitting a wedding reception on its property. Such an extreme reading is contrary to the plain text of RLUIPA, which encourages a broad reading of its protections. RLUIPA § 5(g). It would also have the negative effect of encouraging religious organizations to refuse to share their land with secular groups for broader community functions.

Second, by targeting the use of land for "religious purposes," RLUIPA properly limits the scope of its protection without mandating intrusive judicial inquiry into the precise nature of the uses of the property at issue. *See Ehlers-Renzi*, 224 F.3d at 290. Far from violating the Establishment Clause, such protection reinforces the Establishment Clause value of avoiding unnecessary

church-state entanglements. *See Amos*, 483 U.S. at 339 (noting that religious accommodation reduces entanglement). *See also Hernandez v. Comm'r*, 490 U.S. 680, 699 (1989) ("It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith…."); *Serbian Eastern Orthodox Diocese for the United States and Canada* v. *Milivojevich*, 426 U.S. 696, 718-19 (1976) (describing a "detailed review" of internal church procedures as "impermissible under the First and Fourteenth Amendments").

The Seventh Circuit reached a similar conclusion in *Cohen* v. *City of Des Plaines*, 8 F.3d 484 (7th Cir. 1993). There, the court upheld a city ordinance which exempted day care facilities run by religious organizations from the general rule that day care facilities obtain a permit to operate in residential areas. The court found the exemption did not violate the Establishment Clause, since it operated to prevent government interference with religious decisionmaking and to lift government-imposed burdens on religious education. *Id.* at 490-94. The court also found that detailed inquiry into the precise nature of the child care activities would create—rather than eliminate—Constitutional problems.[9] Similarly, WDS need

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[9] *Id.* at 490. Specifically, the Court explained:

> Moreover, we are wary of holding that the Des Plaines' ordinance would pass muster under *Lemon*'s purpose requirement only if it stated that nursery school and day care center activities must be "religious" in nature. First, it is not up to legislatures (or to courts for that matter) to say what activities are sufficiently "religious." Any legislative or judicial attempt at such a

not prove that every room is exclusively and solely for religious exercise. Detailed probing into the religious nature of every activity, every class, is likely to create—not remedy—Establishment Clause problems.

Thus, the Village's argument that facilities must be wholly devoted to religious activity in order to qualify for protection under RLUIPA is contrary to existing precedent of the Supreme Court, this Court and other circuits. In-depth inquiry into the religious nature of the land use at issue is likely to create, rather than alleviate, government entanglement with religion. *Boyajian,* 212 F.3d at 8; *Ehlers-Renzi,* 224 F.3d at 290; *Cohen,* 8 F.3d at 490.

2. WDS' facilities are, in fact, devoted to religious exercise.

Although WDS need not prove that its facilities are devoted to religious exercise, numerous factual findings by the trial court demonstrate that this is, in fact, the case. For younger students, religious and general studies are "totally integrated and the children receive simultaneous instruction in both Judaic and general studies." 417 F.Supp.2d at 495. For older students, half their time is spent studying explicitly religious subjects, and the rest is spent in studies which are "are permeated with religious aspects." *Id.* at 496. Religious teaching "is integrated, to

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> definition would surely fail. Worse, it would almost certainly undercut the neutral posture required of every branch of government under the Establishment Clause.

Id.

varying degrees, in general studies classes such as language arts, social studies, math and science, as well as music and art." *Id.* Moreover, classes (as in any school) rotate to different rooms from year to year, meaning all instructional space will be used for explicitly religious subjects at some point. *Id.* at 498. Students also take part in various religious observances throughout the school day, such as praying in their classrooms, and students must adhere to Jewish dietary law and dress standards while present at the school. *Id.* at 496.

Just like the religious instruction occurring in the classes of schools that are members of *amici* the Association of Christian Schools International and the Council for Christian Colleges and Universities, WDS' religious instruction is not incidental to its existence. Instead, rather, "it is clear that WDS would not exist without its religious mission." *Id.* at 498. The lower court's factual findings amply demonstrate that WDS engages in religious exercise throughout its campus, in every building and during every part of the school day.

Accordingly, RLUIPA protects WDS' land use for the purposes of religious exercise, and creates no Establishment Clause problems by lifting government-imposed burdens on religious schools while not creating similar exemptions for secular schools. The district court correctly held that the Village's permit denial placed a substantial burden on WDS' religious exercise.

CONCLUSION

For the foregoing reasons, the judgment of the trial court should be AFFIRMED.

Respectfully submitted,

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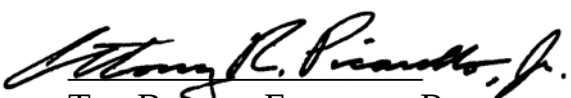

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I hereby certify that this brief *amicus curiae* complies with the type-volume limitation set forth in Federal Rule of Appellate Procedure 32(a)(7)(B)(i). The brief consists of 6,789 words. The font used is Times New Roman at 14-point type. The word count was performed by the word count function on the word processing program used to prepare the brief (Microsoft Office Word 2003).

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CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Brief *Amicus Curiae* of the Becket Fund for Religious Liberty, the Association of Christian Schools International, and the Council for Christian Colleges and Universities in Support of Plaintiff-Appellee and in Support of Affirmance were served upon the following counsel by second-day DHL delivery service on this 22nd day of August, 2006:

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APPENDIX A

The Becket Fund for Religious Liberty is a non-partisan, interfaith, public interest law firm dedicated to protecting the free expression of all religious traditions. The Becket Fund litigates in support of these principles in state and federal courts throughout the United States, both as primary counsel and as *amicus curiae*.

Accordingly, the Becket Fund has been heavily involved in litigation on behalf of a wide variety of religious worshippers, ministers, and institutions under the new Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc, *et seq.* ("RLUIPA" or "the Act"). The Becket Fund's RLUIPA cases run the gamut—as *amicus curiae* and as plaintiffs' counsel, in prisoner and land-use cases, from New Hampshire to Hawaii—including cases arising out of this Circuit.[1] The Becket Fund is also litigating a host of RLUIPA land-use cases as plaintiffs' counsel outside Connecticut, including some that have resulted in published decisions.[2] Some of our RLUIPA land-use cases have concluded by

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[1] *See, e.g., Murphy* v. *Town of New Milford*, 402 F.3d 342 (2d Cir. 2005) (*amicus* brief filed June 28, 2004); *Westchester Day School* v. *Village of Mamaroneck*, 386 F.3d 183 (2d Cir. 2004) (*amicus* brief on behalf of a broad coalition filed January 20, 2004); *Fifth Avenue Presbyterian Church* v. *City of New York*, 293 F.3d 570 (2d Cir. 2002) (*amicus* brief filed on behalf of broad coalition, Mar. 15, 2002); *Murphy v. Town of New Milford*, 289 F. Supp. 2d 87 (D. Conn. 2003) (*amicus* brief filed Dec. 27, 2002).

[2] *See, e.g., Congregation Kol Ami* v. *Abington Township,* 2004 WL 1837037 (E.D. Pa. Aug. 17, 2004); *Castle Hills First Baptist Church* v. *City of Castle Hills*,

favorable settlement.[3] In addition, we have filed a series of *amicus* briefs in both land-use and prisoner cases involving RLUIPA.[4] We intend to continue filing

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2004 WL 546792 (W.D. Tex. Mar. 17, 2004); *United States* v. *Maui County*, 298 F. Supp. 2d 1010 (D. Haw. 2003); *Hale O Kaula* v. *Maui Planning Comm'n*, 229 F. Supp. 2d 1056 (D. Haw. 2002); *Cottonwood Christian Center* v. *City of Cypress*, 218 F. Supp. 2d 1203 (C.D. Cal. 2002); *Freedom Baptist Church v. Township of Middletown*, 204 F. Supp. 2d 857 (E.D. Pa. 2002). *See also Living Water Church of God* v. *Charter Township of Meridian*, No. 05-2309 (6th Cir. filed April 19, 2006) (pending); *Redwood Christian Schs.* v. *County of Alameda*, Civ. No. 01-4282 (N.D. Cal. filed Nov. 16, 2001) (pending); *Missionaries of Charity, Brothers v. City of Los Angeles*, Civ. No. 01-08511 (C.D. Ca. filed Sept. 19, 2001) (pending); *Great Lakes Society* v. *Georgetown Charter Township*, No. 03-4599-AA (Mich. Cir. Ct., Ottowa Cy.) (pending).

[3] *See, e.g., Living Faith Ministries* v. *Camden County Improvement Authority*, Civ. No. 05 cv 877 (D.N.J. filed Feb. 15, 2005) (consent order signed May 2, 2005); *Temple B'nai Sholom* v. *City of Huntsville*, Civ. No. 01-1412 (N.D. Ala. removed June 1, 2001) (settlement agreement signed June 2003); *Greenwood Comm'y Church* v. *City of Greenwood Village*, Civ. No. 02-1426 (Colo. Dist. Ct.) (permit granted Dec. 2, 2002); *Living Waters Bible Church* v. *Town of Enfield*, Civ. No. 01-450 (D.N.H.) (agreement for entry of judgment signed Nov. 18, 2002); *Calvary Chapel O'Hare* v. *Village of Franklin Park*, Civ. No. 02-3338 (N.D. Ill.) (settlement agreement signed Sept. 3, 2002); *Refuge Temple Ministries v. City of Forest Park*, Civ. No. 01-0958 (N.D. Ga. filed Apr. 12, 2001) (consent order signed Mar. 2002); *Unitarian Universalist Church of Akron v. City of Fairlawn*, Civ. No. 00-3021 (N.D. Ohio) (settlement approved Oct. 1, 2001); *Haven Shores Comm'y Church v. City of Grand Haven*, No. 1:00-CV-175 (W.D. Mich.) (consent decree signed Dec. 20, 2000); *Pine Hills Zendo* v. *Town of Bedford, N.Y. Zoning Bd. of Appeals*, No. 17833-01 (N.Y. Sup. Ct.) (settlement agreement allowing religious use and paying plaintiffs' costs, Apr. 8, 2002).

[4] *See, e.g., Cutter* v. *Wilkinson*, 125 S. Ct. 2113 (2005) (*amicus* brief on behalf of a broad coalition filed December 20, 2004); *Guru Nanak Sikh Soc'y* v. *County of Sutter*, --- F.3d ---, 2006 WL 2129737 (9th Cir. Aug. 1, 2006) (amicus brief filed June 9, 2004); *Konikov* v. *Orange County*, 410 F.3d 1317 (11th Cir. 2005) (*amicus* brief filed on behalf of a broad coalition Apr. 15, 2004); *Midrash Sephardi* v. *Town of Surfside*, 366 F.3d 1214 (11th Cir. 2004) (*amicus* brief filed Nov. 21, 2003); *Madison* v. *Riter*, 355 F.3d 310 (4th Cir. 2003) (*amicus* brief filed on behalf of a

lawsuits and *amicus curiae* briefs under RLUIPA until the jurisprudence under the law, as well as its constitutionality, is established beyond reasonable dispute.

Finally, Becket Fund attorneys have published two law review articles on RLUIPA, one on its land use provisions and another on its prisoner provisions. *See* Derek Gaubatz, *RLUIPA at Four: Evaluating the Success and Constitutionality of RLUIPA's Prisoner Provisions,* 28 HARV. J.L. & PUB. POL'Y 501 (2005); Roman Storzer & Anthony Picarello, *The Religious Land Use and Institutionalized Persons Act of 2000: A Constitutional Response to Unconstitutional Zoning Practices*, 9 GEO. MASON L. REV. 929 (Summer 2001).

The Council for Christian Colleges and Universities is an association of 105 accredited colleges and universities in North America and 74 affiliates in 23 countries. The Council represents more than 25 denominational traditions. This case and a proper interpretation of RLUIPA is of enormous import for all of faith-

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broad coalition June 6, 2003); *San Jose Christian College* v. *City of Morgan Hill*, 360 F.3d 1024 (9th Cir. 2004) (*amicus* brief filed on behalf of a broad coalition Aug. 28, 2002); *C.L.U.B.* v. *City of Chicago*, 342 F.3d 752 (7th Cir. 2003) (*amicus* brief filed June 26, 2002); *Feagans* v. *Norris*, No: 4:03CV00172 (E.D.Ark.) (*amicus* brief filed September 2004); *Open Homes Fellowship* v. *Orange County*, No. 6:03-CV-943-ORL-31 (M.D. Fla.) (*amicus* brief filed Jan. 2, 2004); *Williams* v. *Bitner*, 285 F. Supp. 2d 593 (M.D. Pa. 2003) (*amicus* brief filed Apr. 16, 2002); *Johnson* v. *Martin*, 223 F. Supp. 2d 820, 822 (W.D. Mich. 2002) (noting Becket Fund intervention in defense of constitutionality of RLUIPA); *Goodman v. Snyder*, 2003 WL 22765047 (N.D. Ill. Nov. 20, 2003) (*amicus* brief filed Mar. 17, 2003); *Archdiocese of Denver* v. *Town of Foxfield*, Case No. 01-CV-3299 (Colo. D.Ct.).

based higher education, especially our members that have property within the Second Circuit.

The Association of Christian Schools International ("ACSI") is a nonprofit, non-denominational, religious association providing support services to more than 3,950 Christian preschool, elementary, and secondary schools in the United States. One hundred sixteen of these schools are located within the boundaries of the Second Circuit. Accordingly, this case, particularly as it addresses issues concerning the constitutionality of RLUIPA and the interpretation of its provisions is of great importance to ACSI.